United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2336

To be argued by
JOHN J. LOFLIN

United States Court of Appeals

For the Second Circuit

CBS INC.,

Plaintiff-Appellant,

against

STOKELY-VAN CAMP, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

DEFENDANT-APPELLEE'S BRIEF

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DEFENDANT-APPELLEE'S BRIEF

Preliminary Statement

This is an appeal from an order and decision of Judge Inzer B. Wyatt, dated August 30, 1974, which granted summary judgment to defendant-appellee, Stokely-Van Camp, Inc. ("Stokely"), dismissing the complaint herein. In this action, plaintiff-appellant CBS, Inc. ("CBS") sought to recover $428,497, representing its charges for television broadcast time which was ordered by Lennen & Newell, Inc. ("Lennen" or "L&N"), Stokely's advertising agency, for the televising of commercial announcements promoting

Stokely's products over a period from December 1970 to September 1971.*

CBS billed Lennen for these charges during 1971, as the broadcasts were made, but Lennen failed to pay those bills. They were still unpaid at the time Lennen filed a petition under Chapter XI of the Bankruptcy Act in February 1972. CBS first asserted this claim against Stokely on February 23, 1972 contending that Stokely was directly liable for the broadcasts as Lennen's principal, Lennen having signed form contracts for some of the broadcast time involved as "agent" for Stokely.

Stokely denied any liability on the grounds that (1) it had paid the full television broadcast charges to Lennen in accordance with the terms of Lennen's statements; (2) Lennen had no authority to execute contracts as Stokely's agent or to bind Stokely to direct liability to CBS; (3) CBS had dealt with Lennen as an independent contractor and not as agent for Stokely, and had at all times treated Lennen as the party solely responsible for payment, irrespective of the form contracts; and (4) in any event, CBS was estopped to look to Stokely for payment of its broadcast charges by reason of its having granted Lennen repeated extensions of time to pay the charges, in contravention of the terms of the aforesaid "contracts." This was done by CBS at a time when it knew that (i) Lennen had received payment from Stokely for these television charges and used the money for other debts and (ii) Lennen had suffered and was continuing to suffer substantial financial losses, and was on the brink of bankruptcy. CBS made no effort to notify Stokely of these facts or

* The orders involved in this suit consist of two orders of network program time placed by Lennen in April 1971 for broadcasting in July and August of that year and 13 orders of "spots" on CBS' five wholly owned stations, placed during the period from December 1970 to September 1971, for broadcast shortly after the date of each order.

of CBS' intention to look to Stokely for payment in the event Lennen failed. Not having any knowledge or notice of the state of Lennen's affairs or its obligations to CBS, nor any notice of CBS' purported claim of direct liability, Stokely made substantial payments to Lennen throughout the year 1971, both with respect to the CBS broadcasts and other advertising.

The District Court found that Lennen had neither express nor apparent authority to bind Stokely to direct liability for the cost of the television broadcasts in question, and that CBS had in fact dealt with Lennen as an independent contractor, relying solely upon its credit and responsibility for payment. Alternatively, the court found CBS was estopped to look to Stokely after having treated Lennen as its sole debtor, and having agreed to substantial modifications of its terms of credit, in cooperation with other creditors of the agency, with full knowledge of Lennen's precarious financial position but without any notice to Stokely.

Counter Statement of the Issues

1. Where Lennen had agreed with Stokely that it would be solely liable for the purchase of advertising for Stokely products and the orders for such advertising were negotiated solely between Lennen and CBS, without consultation with or notice to Stokely, should the conclusion of the District Court on undisputed facts that Lennen had neither express nor apparent authority to bind Stokely for payment thereof be reversed?

2. Where CBS made no attempt to negotiate with Stokely as to initial or revised terms for payment of advertising and pursued a policy of not advising advertisers of defaults in payments by agencies such as Lennen, should the

conclusion of the District Court on undisputed facts that CBS dealt with Lennen as an independent contractor be reversed?

3. Alternatively, where CBS knew as early as 1970 that Lennen had serious financial problems and, unknown to Stokely was directing to other uses funds paid by Stokely to Lennen for its television commercials, and where nevertheless CBS continued to extend credit to Lennen without notice to Stokely, to the point of Lennen's bankruptcy in 1972, and only then advised Stokely that it considered Stokely liable for unpaid invoices rendered to Lennen, should the conclusion of the District Court on undisputed facts that CBS was estopped by its own conduct from recovery against Stokely be reversed?

Statement of Facts

(a) The Relationship Between Stokely and Lennen

The course of dealing between Stokely and Lennen, Stokely's advertising agency for 17 years, was based upon an oral understanding (22a). Once it established its advertising budget for the year, Stokely would receive suggestions from Lennen with respect to the type of advertising activities it might engage in within that budget (22a). Stokely would then decide upon a marketing plan which would specify a "buying platform" of the amount of television advertising desired (22a). This buying platform was put in terms of the particular type and number of consumers sought to be reached and advertising impressions sought to be made, i.e., gross rating points or total hours (22a). Stokely's understanding with Lennen was that it was Lennen's sole responsibility to select and purchase the broadcasting time necessary to fulfill the buying platform

(23a). Stokely at no time determined, or exercised any control over, the selection of the program, time, station or network to be procured by Lennen (23a). Stokely's only involvement in Lennen's purchase of broadcast time was to review Lennen's bills to it to check the accuracy of the charges as compared with the agency's estimates of total costs to carry out the buying platform (23a).

Stokely was informed of the program or time, station and/or network after Lennen made the purchases. In the case of network program buys, Lennen would advise Stokely 45 to 60 days before broadcast (23a); in the case of spot announcements, Stokely would learn of the time and station only a few days before the broadcast (23a).

Stokely had no knowledge of any contracts or agreements which Lennen made in purchasing broadcast time from CBS or any other network, except that it knew that Lennen was being compensated by the networks' allowance of a commission or other form of compensation (25a, 88a).

In December 1971 upon learning that one of the media companies with whom Lennen dealt, General Electric Broadcasting, Inc., had adopted a new contract to be used in the sale of its broadcast time, which imposed joint liability upon the advertising agency and the advertiser, Stokely immediately instructed Lennen that it would not accept such responsibility (23a, 30a). Lennen's response assured Stokely that it had and would continue to deal with media on the basis of the agency being solely liable (31a-32a).

Lennen billed Stokely for its media purchases, including the charges for CBS broadcasting time, independently of the network's bills to it, often billing Stokely prior to the

agency's receipt of its bill from CBS (11a). Lennen's bills to Stokely were payable within 10 days after receipt and Stokely paid them promptly. Stokely had no knowledge of Lennen's arrangements with CBS respecting payment or the status of its account, until early 1972 when it learned of Lennen's debts to CBS and other creditors and its inability to pay them (24a).

Not knowing that Lennen had made no payment whatsoever to CBS for Stokely's broadcasts after July 30, 1971, at which time Lennen was already in substantial arrears to the network, and not knowing of the severe financial straits into which Lennen had fallen, Stokely continued to make payments to Lennen throughout 1971 (11a, 25a). It paid all of the bills Lennen submitted, representing charges for all advertising, including the broadcast time which is the subject of this suit. Stokely paid Lennen $943,268.84 in November and December 1971 for advertising on media other than CBS, for which Lennen never paid its media creditors, some of which have made claim therefor against Stokely (25a).

On January 13, 1972 Lennen's representatives came to Stokely's offices in Indianapolis and advised Stokely for the first time that Lennen had been financially unstable for several years; that it owed its media and production creditors approximately $10 million and did not have sufficient moneys to pay them and that it had not paid CBS for the TV broadcasts which are the subject of this suit (24a). Stokely immediately cancelled a payment of $78,313.11 which was about to be made to Lennen on billings received shortly before this time (25a-26a).

(b) CBS' Relationship with Lennen

By 1971 CBS had dealt with Lennen for some years (125a). Prior to 1970 Lennen had been one of the largest agencies in the country and CBS' billings to it had been very high (159a). In the sale of the broadcast time which is the subject of this suit, as well as sales of time for prior Stokely advertising, CBS dealt solely with Lennen. Neither its network salesman nor its stations sales personnel ever contacted or communicated with Stokely or Stokely's representatives (173a 175a; Supplemental Stipulation 12a). While in confirming Lennen's verbal orders for these broadcasts, CBS issued its printed contracts designating Lennen as "agent" for the advertiser Stokely, CBS never sought to have these contracts signed or acknowledged by Stokely, or to verify Lennen's authority to sign them in Stokely's name.*

CBS billed Lennen for the time charges and related costs of the broadcasts in question, the amount billed being subject to deduction of a "standard agency commission of 15 percent" (Primary Documents Exhibits E, H, J, L, N, P, R, T, V, X, Z, BB, DD, FF and HH). Stokely at no time was given notice or had any knowledge of any of these arrangements between CBS and Lennen (24a).

The form contracts for the network programming called for payment in monthly installments by the end of the month in which billed; the station contracts provided for

* The form contracts sent to Lennen by CBS for the two network transactions were not signed by Lennen or CBS, although signature by both was called for by the CBS letter forwarding the contracts to Lennen (Exhibits C and G). The form contracts for 12 of the 13 station transactions, which also designated Lennen as "agent" were signed by a representative or time buyer of Lennen (Exhibits I, K, M, O, Q, S, U, W, Y, AA, CC, EE and GG).

payment within 10 days of receipt of each invoice. CBS' former credit manager, Louis W. Werle, testified that in practice CBS expected payment for network time by the end of the month following the running of the broadcast (137a); Marvin Schrager, former credit manager of CBS' Stations Division, testified that for station broadcasts payment was expected within 30 days of receipt of a bill by the agency (159a). John D. Speirs, a former officer of Lennen, confirmed that this was the practice between CBS and Lennen (59a).

The summary of invoices and payments annexed to the stipulation dated October 31, 1973 shows that Lennen made no payment on network broadcasts after July 30, 1971 (11a-1). The first of the network invoices which are the subject of this action was sent by CBS on June 29, 1971 ($70,990) and these June 29 invoices, together with subsequent invoices totaling $193,273, rendered over the next three months, remained unpaid by Lennen. The summary also shows that the moneys due the CBS stations began to accrue in early February 1971; that invoices sent in February and in each of the following months during the remainder of 1971 remained unpaid (11a-1-2). Lennen made no payment for station broadcasts after July 9, 1971, on which date it had paid several prior bills from December 1970 and January 1971 (11a-1).

Despite the fact that Lennen was thus violating the payment terms of the "contracts," as well as the more generous standard adopted by CBS, CBS agreed to allow these bills to remain unpaid and continued to sell broadcast time to Lennen (Speirs affidavit 58a, 59a). Indeed, this was but the continuation of a pattern begun sometime in early 1970. At that time Lennen fell behind in payments to CBS

and CBS credit personnel met with Lennen's officers to discuss the reasons for non-payment (59a).

As CBS' credit manager, Louis W. Werle, testified in his deposition, CBS learned from these meetings that Lennen was experiencing severe cash flow problems (136a). CBS' controller, Louis J. Rauchenberger, testified on deposition that he learned that the profit anticipated from Lennen's acquisition of additional agencies had not materialized (107a). (See also Speirs affidavit 58a.) CBS also understood from these meetings that Lennen had received moneys from advertisers for the payment of media bills which it had not paid over to CBS (Werle 136a). CBS, nevertheless, decided to give Lennen "a little more time" (Rauchenberger 21a). CBS made no attempt to inform Stokely that Lennen was not applying moneys paid by Stokely to statements rendered by CBS. Nor that if things didn't work out for Lennen, CBS would expect Stokely to pay for the same services twice.

As a result of the 1970 problems CBS continued to maintain surveillance over Lennen's financial status during 1970 and 1971 (121a). Lennen representatives and CBS credit men met many times during 1970 and 1971, at which meetings CBS requested and received detailed information concerning Lennen's operations, its earnings, expenses, etc. (Speirs 59a, 62a).* In addition Lennen was also meeting with the other networks and Mr. Speirs stated in his affidavit that CBS representatives told him that they were continually checking with the other networks regarding Len-

* CBS also monitored Lennen's credit standing by its participation in the radio and television group of a credit association, The New York Credit Group, a group of credit managers (143a-144a). At meetings of this association, media representatives would discuss any credit problems with respect to the advertising agencies (144a).

nen's accounts with CBS (59a). Both Messrs. Werle and Schrager (of CBS) testified that it was their understanding from these meetings that Lennen's failure to pay was due to internal problems, not non-payment of its bills by its advertisers (150a, 163a). Mr. Speirs stated he specifically informed CBS that Stokely was current in its payments, but that Lennen was using moneys received from its advertisers for other pressing needs (59a). CBS continued to "go along" with Lennen and give it time to catch up (Werle 141a, Speirs 59a). Indeed, Lennen never paid its entire balance owing to CBS in any month in 1970 and 1971 and CBS agreed to permit it to carry an outstanding balance each month up to $500,000 (Speirs 58a-59a).

At a meeting on October 29, 1971, CBS reviewed the latest financial statements and the Lennen spokesmen stated that "a merger is necessary if L&N is to survive" (CBS memorandum dated November 16, 1971, Ex. 00). Mr. Werle confirmed his understanding at that time was that if Lennen "hoped to stay in business they would have to effect a merger" (141a). Again, CBS agreed to continue "work with the agency" (Ex. 00). As stated by Mr. Werle in his deposition, CBS' reluctance to take action was "because we didn't want to jeopardize their [Lennen's] chances in surviving" (147a). Obviously, Lennen's survival represented extensive continued business to CBS. Notification to the advertisers was apparently the last thing that Lennen desired and CBS was well aware that such notice would cause advertisers to leave the agency. (Mr. Werle testified that Lennen "felt if the creditors took any action they would start losing their clients, the advertisers" (146a). In fact, J. Lewis Ames, Vice President of Lennen, who represented the agency at meetings with CBS, stated

in his affidavit, that the question of CBS seeking direct payment from advertisers was raised by it as early as September 2 (64a) but was not pursued by CBS. CBS' memorandum of November 16, 1971 indicates the reason—it expresses CBS' concern that any arrangements for direct payment by the clients could force Lennen into bankruptcy (Ex. 00).

Although CBS contends that it was advised by Lennen that its advertisers had been informed of the agency's problems (CBS brief pp. 38-42), the evidence it relies upon consists of general statements by its representatives to the effect that they were led to believe that Lennen's advertisers knew of the agency's financial condition (151a), or that the agency was delinquent (163a), or that they "assumed" the advertisers were aware of its problems (124a-125a). The affidavits of Messrs. Speirs, Ames and Newberry establish that Lennen at no time notified Stokely of its problems nor represented to CBS that it had (24a, 60a, 65a). CBS does not contend that anyone at Lennen represented that Stokely specifically had been advised of the agency's financial plight during or prior to the end of 1971, although the balance unpaid for Stokely's advertising on CBS far exceeded that of any other Lennen client. As of October 29, 1971 Lennen's obligation to CBS was $714,000, of which more than half represented bills for Stokely advertising (Ex. 00).

From November 1971 CBS representatives attended meetings called by Lennen of all of its creditors and participated as a member of this creditor's committee (60a, 146a). These creditors, including CBS, agreed to allow a freeze on all of Lennen's obligations up to and including October 31 (Werle 150a). CBS agreed to continue to sell

broadcast time to Lennen on condition that it keep current in paying for all such further broadcasting (150a, Speirs 159a-160a). Lennen first asked the creditors to allow it to the end of 1972 to pay out its back debt (146a) and CBS agreed to go along with this proposal (147a). Shortly thereafter Lennen modified this proposal to permit a period of two to three years for such payment (CBS memorandum of November 17, 1971, Ex. 00). CBS "in effect" agreed to go along with this as well—all without notice to Stokely (Werle 148a).

The CBS memorandum of November 16, 1971 indicates that at that time Mr. Rauchenberger felt that Lennen was "close to insolvency" (Ex. 00). Yet, still no action was taken by CBS to enforce collection of these bills or to contact advertisers to advise them of the agency's failure to pay these bills.

In late January, 1972 Lennen proposed an arrangement to its creditors, including CBS, which contemplated payment of 50 cents on the dollar (Speirs 61a, CBS memorandum dated January 27, 1972, Ex. 00). On January 27, 1972, CBS withdrew from the creditors' committee (Werle 150a).

CBS took no action during any of this period to enforce collection from Lennen or to advise Stokely that Lennen was not paying CBS for the broadcast charges for which Stokely had already paid Lennen, or that CBS was entering into various agreements for Lennen's delay or deferral of payment of these charges, or that CBS intended to look to Stokely for payment in the event Lennen did not pay its bills (25a, 125a).

It was not the practice at CBS to contact advertisers if the bills for their commercials went unpaid. The CBS network credit manager, Louis Werle, testified (154a):

> "Q. But in any event, you never told Stokely that the charges for its advertising were not being paid by Lennen & Newell?
>
> A. No, it wasn't a custom in our business to contact the advertiser * * *
>
> Q. That was not your custom?
>
> A. It was not our custom and I don't think it was the custom in the whole industry."

Mr. Werle confirmed, however, that it was the custom to go to the advertiser for payment "If all other methods have failed * * *" (154a).

Marvin Schrager, the CBS stations credit manager, described CBS's policy as follows (164a):

> "Q. Was it the policy of your division to deal with the advertisers directly when the accounts were in arrears?
>
> A. Not really, well—no. Not when an account was in arrears.
>
> Q. Your practice then, I take it, was to deal with the advertising agencies about those problems?
>
> A. Right, we were always paid by the agencies and we dealt always directly with the agencies."

Lennen filed an application under Chapter XI on February 2, 1972 (61a). On February 23, 1972 for the first time, CBS notified Stokely that it would look to it for payment of the outstanding bills to Lennen representing charges for the broadcast of Stokely's advertising messages (25a, Ex. II).

POINT I

The District Court correctly found that Lennen had no actual or apparent authority to obligate Stokely to CBS.

The District Court found that Lennen had neither actual nor apparent authority to enter contracts with CBS in Stokely's name or to bind it to any obligation for the payment of CBS' charges for the broadcast time which Lennen had ordered from it (80a, 81a). This finding was fully justified by the evidence submitted on the motion.

Mr. Marcus Newberry, Director of Marketing for Stokely, stated clearly in his affidavit:

> "Stokely's arrangement with L&N [Lennen] was for L&N to purchase media space or broadcast time on L&N's sole responsibility and credit, and not upon Stokely's credit or in its name."* (23a)

As the District Court noted, the express denial by Stokely of authority for Lennen to deal in its behalf or to act as its agent in the purchase of media was fully confirmed by the correspondence between Stokely and Lennen in December 1971 (76a). At that time, Stokely was advised that a TV station, General Electric Broadcasting, Inc., had

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* In its brief (pp. 15-16) CBS suggests that Mr. Newberry's testimony that Stokely had no communications with Lennen regarding the agency's contractual arrangements with CBS in this matter, negates his testimony of the understanding between Stokely and Lennen that Lennen was to be solely responsible for the purchase of and payment for broadcast time. Such an interpretation completely distorts his testimony, which clearly related only to communications regarding Lennen's arrangements with CBS and not to communications over 17 years of dealings concerning Lennen's arrangements with the media.

adopted a contract for use in its transactions with Lennen, which would impose joint liability upon Stokely as the advertiser as well as Lennen as the agency. Stokely immediately wrote to Lennen to state its refusal to accept any such liability (30a). Lennen's response assured Stokely that the agency was solely liable for payments to media; and that this was in accord with the practices in the industry and accepted by its media creditors (31a-32a). That this was the practice in the industry was further confirmed by the affidavit of Mr. Ames, a former officer of Lennen (66a). (The only testimony by CBS representatives relating to any "practice" in this case (quoted at pp. 11 and 25 of CBS brief) relates to CBS "corporate policy"—not to industry practice.)

The evidence also clearly demonstrated that Stokely exercised no control over Lennen's purchase of time from CBS; it merely set a dollar limit and a buying platform defining the gross rating points and/or broadcast time required for its advertising plan. Stokely had nothing to do with Lennen's selection or purchase of particular programs or spots. As Mr. Newberry stated:

> "The selection of network, station, time and program was never dictated by Stokely and was entirely within L&N's responsibility." (23a)

On the face of it, the fact that Lennen advised Stokely generally as to advertising activities in formulating its marketing plans, or that Stokely's accounting department reviewed Lennen's bills to see if they came within the agency's estimates of gross costs does not—as CBS contends—represent an exercise of control by Stokely over

Lennen's purchase of media. Indeed CBS' position that Lennen had express authority to bind Stokely is groundless, without support in the record. Similarly, the contention that Lennen had implied authority clearly has no merit since, as pointed out in Section 7 of the Restatement, Agency Second (quoted in CBS brief at pp. 12-14), it is only in the absence of express agreement with respect to authority, that authority may be implied by reason of the nature of the transaction or conduct of the parties.

The District Court also found that there was no conduct by Stokely at any time which was inconsistent with its dealing with Lennen as an independent contractor, or which could reasonably be viewed by CBS as creating apparent authority on the part of Lennen to act as Stokely's agent. CBS' claim in this respect comes down to one of alleged reliance on the mere fact that Lennen continued to purchase from it broadcast time for Stokely advertising. As the District Court found, the fact that Lennen made such purchases does not carry with it any necessary implication that in doing so Lennen was acting as Stokely's agent for the purpose of pledging its credit under contracts Stokely never signed or never saw (81a). Stokely did not know that Lennen was signing contracts purporting to bind it.* Its failure

* It is, of course, hornbook law that agency cannot be established by the purported agent's own representations. Indeed, even the parties' designation is not conclusive. As stated in the Restatement of Agency, Second (1958), Ch. 1, p. 8:

> "When it is doubtful whether a representative is the agent of one or the other of two contracting parties, the function of the court is to ascertain the factual relation of the parties to each other and in so doing can properly *disregard a statement in the agreement that the agent is to be the agent of one rather than of the other, or a statement by the parties as to the legal relations which are thereby created* * * *." (emphasis added)

to repudiate them did not constitute acquiescence in such action.

Mr. Newberry's testimony that he referred media salesmen to Lennen, as the buyer of time for Stokely advertising (96a), is fully consistent with Lennen's status as an independent contractor. If anything, it demonstrates Stokely's lack of control over Lennen's purchases of time. Furthermore, CBS did not rely upon any statement or conduct by Stokely; its salesmen never called on Stokely or had any contact whatsoever with it (12a, 175a).

Sections 8 and 27 of the Restatement, quoted by CBS at pp. 18 and 19 of its brief, clearly enunciate the rule as to when apparent authority may be found to exist. It can only arise from conduct on the part of the purported principal which—when reasonably interpreted by a third person—causes him to believe the "principal" consents to the acts of another as its agent. As stated in Section 27 of the Restatement, Ch. 3, at p. 104:

> "For apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person * * *."

As the Court below found, there was a total absence of any conduct on Stokely's part which could be reasonably interpreted to indicate consent by it for Lennen to contract with CBS in its name or upon its credit (81a).

The question of agency in a given instance always depends upon the peculiar facts of that transaction. Accordingly the cases from the various jurisdictions outside New York, cited by CBS, in which an advertising agency was

recognized as the agent of the advertiser, are not determinative. In each of such cases, the party urging an agency relationship was able to establish the requisite authority and control by the purported principal. Indeed, in most of the cases cited by CBS where an advertising agency was found to be the agent of the advertiser that authority was in effect conceded, the issues in those cases involved other questions.*

Furthermore, while the question of whether an advertising agency may function as the agent of the advertiser depends upon elements of authority and control, the question of whether it in fact functioned as agent of the advertiser in a particular transaction depends also upon whether the third party dealt with it in such capacity or as a principal. The cases uniformly hold that where a third party relies upon the credit of an agent, he cannot thereafter resort to the principal, even if the agent acted within the scope of his authority and for the benefit of his principal. 3 C.J.S. Agency, §411.

In *Clarke* v. *Watt,* 83 Misc. 404, 145 N.Y.S. 145 (App. Term 1st Dept. 1913), upon which CBS appears to rely for its contention that the advertising agency is the agent of the advertiser, the ultimate issue of the responsibility of the advertiser was left for a further trial. The court stated

* For example, in *Bamberger Broadcasting Services, Inc.* v. *William Irving Hamilton, Inc.,* 33 F.Supp. 273 (S.D.N.Y. 1940) the advertiser conceded the contract with the media was made in its name, at its direction. The only dispute was as to the right of cancellation under the contract. In *H. W. Kastor & Sons Advertising Co.* v. *Grove Laboratories,* 58 F.Supp. 1011 (E.D.Mo. 1945), a suit by an agency to recover for services rendered for the advertiser's benefit, the only issue was the amount of compensation to which the agency was entitled.

that if it were found that the plaintiff (media) relied on the credit of the agency rather than the advertiser, the plaintiff could not claim that it dealt with the agency as "agent" and could not hold the advertiser liable. Indeed, Judge Lehman in his dissent concluded that the advertising agency was an independent contractor, since the evidence showed that the plaintiff initially looked solely to the agency for payment and only sought to hold the principal when such efforts failed. (Furthermore, in that case the advertiser apparently had not paid either the media or the advertising agency for the advertising which it had obtained, and the case accordingly involved far different equities than here.)

In an unreported decision dated May 28, 1970 in *American Broadcasting Companies, Inc.* v. *North American Van Lines, Inc.* (65 Civ. No. 3674, S.D.N.Y. May 28, 1970, not officially reported) Judge Mansfield held that if a network sold broadcast time to an advertising agency, and relied upon the credit of the agency and looked solely to the advertising agency for performance, the advertiser could not be held liable as a principal despite the fact that the purchase was for its ultimate benefit. (A copy of this decision is contained in the Appendix to this brief.) ABC sued North American Van Lines, Inc. (North American), the advertiser, claiming that North American's advertising agency, E. H. Russell, McCloskey & Company ("Russell"), had contracted with ABC on its behalf as a disclosed principal. North American was denominated the "advertiser" in the contract. The suit was brought when the agency defaulted in payments and became insolvent.

The Court stated the applicable law as follows:

> "In this case, an issue of fact is raised as to the nature of the relationship of the parties. ABC [a television station owner] contends that Russell [an advertising agency], as North American's [the advertiser] agent, contracted on behalf of North American a disclosed principal (denominated an 'advertiser' in the contract) and thereby obligated North American to make payment if Russell should default. In support of its contention, ABC cites *Clarke* v. *Watt*, 145 N.Y. Supp. 145, 83 Misc. 404 (App. Term 1st Dept. 1913), to the effect that a disclosed principal which has received the benefits of a contract is obligated to make payment to the third party upon the agent's failure to do so, even though the principal had paid the agent. While that legal maxim is presumed to apply, *Meeker* v. *Clayton*, 44 N.Y. 349 (1871); Restatement (Second) of Agency §146 (1957), *it is rendered inapplicable by a showing that the third party, in contracting with the agent, looked solely to the agent for performance. Stated somewhat differently, a principal is not liable to a third party who contracts with an agent alone and relies solely upon the credit of the agent rather than that of the principal, even though the principal may be the beneficiary of the contract.*" (Emphasis supplied.)

While Judge Mansfield found an issue of fact existed on the record before him, he noted that the evidence indicated that all negotiations were between ABC and the advertising agency; the advertiser never saw the contract and was never asked to sign it; the network billed the advertising agency and sought collection from it independently of the agency's bills to the advertiser; the network failed to give the advertiser notice of the agency's default and in fact met with other creditors of the agency to plan how it could pay its bills without notice to the advertiser; and, in addi-

tion, there was evidence that it was customary in the industry for the media to look solely to the agency for collection. He concluded that " * * * if anything the record * * * indicates that the parties looked solely to Russell for payment." (p. 6).

In a recent decision by Honorable Edward J. Ryan, as Bankruptcy Judge, in *In the Matter of U.S. Media-International Corporation,* 71 B. 996, the Bankruptcy Court rejected a claim by CBS (as well as a similar claim by Westinghouse Broadcasting Company) that the advertisers whose commercials were shown on its network were directly liable to CBS for the purchase price of the television time ordered by an intermediary. In that case the sale was made by CBS to U.S. Media, a media buying service. (A copy of the memorandum decision on the application to restrain CBS and Westinghouse from pursuing claims against the advertisers, which are unreported to date, and the Findings of Fact and Conclusions of Law in the aspect of the case involving CBS are contained in the Appendix to this brief.)

CBS (and Westinghouse) contended that there was a principal-agent relationship between the advertisers and U.S. Media, just as CBS contends in the instant case that there was a principal-agent relationship between Stokely and Lennen—and that the advertisers were directly liable for the television time purchased by their purported agent. After a full evidentiary hearing on the application of the debtor, Judge Ryan concluded, looking to the "totality" of the relationships, that no principal-agent relationship existed between the advertisers and U.S. Media. Further-

more, he found that CBS relied solely upon the credit of U.S. Media and looked to it for payment and that accordingly even if U.S. Media were the agent of the advertisers for the purpose of procuring the network time in question, CBS could not hold the advertisers directly liable.

The pattern of conduct involved was similar in numerous respects to that in the instant case. (1) There was no express authority given by the advertisers to U.S. Media to directly bind them to CBS (Finding 11). (2) While U.S. Media was informed of the budget and audience requirements of the advertisers, it otherwise exercised full control over the selection of program time, etc. (Finding 12). (3) CBS salesmen solicited U.S. Media and concluded agreements for the sale of the television time in question without the participation of the advertisers (Findings 13 and 24). (4) The written "contracts" relied upon by CBS were printed forms which it sent to U.S. Media to confirm the orders; they contained numerous provisions which had not been the subject of negotiations (Findings 15 and 29). The contracts did not call for execution by the advertisers, but provided for U.S. Media to sign as agent, although CBS had neither sought nor obtained any confirmation of such an agency (Findings 11 and 17). (5) CBS billed U.S. Media directly, without any notice to the advertisers and U.S. Media billed the advertisers directly (Finding 18). (6) U.S. Media considered itself solely liable to CBS for the cost of the time purchased, and CBS looked solely to it for payment (Findings 20 and 21). (7) CBS had no significant contact with the advertisers and never indicated to them that it intended to look to them for payment until certain invoices to U.S. Media

had become long overdue and the latter had filed a petition under Chapter XI of the Bankruptcy Act (Findings 24 and 30).

The comparison is striking—there was no more agency relationship between Stokely and Lennen than existed between the advertisers and U.S. Media. Furthermore, even if there were some basis on which an agency relationship could be said to exist, since CBS relied solely upon Lennen for the payment of its charges, it can have no rights against Stokely. As Judge Ryan concluded in the bankruptcy proceedings involving U.S. Media:

> "Even if USM were deemed to be in a principal-agent relationship with advertisers in connection with the purchasing of advertising time for the ultimate use of such advertisers from the CBS Respondent, the CBS Respondent looked solely to USM for payment and relied exclusively upon the credit of USM in connection with said purchases and no claim may be made by the CBS Respondent against any of such advertisers with respect to any debt arising from said purchases." (Conclusion of Law 7)

Another case in which the issue of agency was directly involved and the court also rejected the media company's claim that the advertising agency was the advertiser's agent is *Washington Broadcasting Company* v. *Goozh Gifts, Inc.*, 118 A.2d 392 (Munc. Ct. App. D.C. 1955). In that case, plaintiff broadcasting company sought to recover directly from the advertiser for its services, the latter having already paid the advertising agency which, like Lennen, had become bankrupt. As in this case, the advertiser had no direct contact with the media plaintiff.

The court, looking to all the facts and circumstances of their dealings found (1) the plaintiff broadcasting company, although claiming to have relied solely on the credit of the advertiser, never investigated its credit, (2) the plaintiff admitted that the agency was "accredited" by it, one of the factors in such accreditation being the agency's financial responsibility, (3) in the usual course of business the plaintiff had sued advertising agencies directly for moneys owing on accounts placed with them, (4) the advertising agency's general arrangement with plaintiff was for it to be solely responsible for the cost of advertising placed by it with plaintiff, there being no definitive agreement with respect to this client, and (5) the agency, although authorized to "place advertising" with plaintiff for the defendant, had a general arrangement also to sell radio time to advertisers, and was compensated by way of a commission or discount of the gross advertising charges. Based on all of these findings, the court held that the plaintiff had failed to sustain its burden of proof that the advertising agency acted as the advertiser's agent with regard to the contracts with plaintiff. The court stated:

> "* * * Granting that Shane [the advertising agency] was authorized to place advertising for Goozh, [the advertiser] there was no evidence whatever of any intention that Goozh was to be liable to WOL [the plaintiff media]. On the contrary, it seems to have been established that WOL never intended to hold Goozh, but relied on Shane as its direct contracting party. And there was no evidence from which it could even be inferred that if Goozh paid Shane it would be doing so at its peril. It follows that plaintiff was not entitled to prevail." (118 A.2d at p. 394)

Even if CBS were found to be entitled to rely upon an apparent authority on the part of Lennen to enter the "contracts" in question, the scope of any such authority could not be found to be unlimited or to extend to Lennen's acts in regard to its further dealings with CBS.* When Lennen sought and obtained extension after extension of time for payment of CBS billings, admittedly because of its use of moneys received from Stokely (and other advertisers presumably) for payment of other obligations, CBS never had any reason to believe that Stokely had authorized this scandalous diversion of funds. And it had every reason to believe that if Stokely had known the facts it would have dropped Lennen immediately.

The "contracts" in this case anticipated prompt payment.** CBS' extension of credit by agreement with Lennen in these circumstances would be clearly outside of the scope of any authority which might be found to have been delegated by Stokely to the agency. Such extension of credit to Lennen by CBS operates to relieve Stokely of responsibility under well settled principles of equity. Where an agent deals in a disloyal manner toward its principal with a third party who has notice of such conduct, but nevertheless deals with the agent, the third party can no longer rely upon

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* It is, of course, well settled that a third party dealing with a purported agent has the responsibility of investigating the scope of the "agent's" authority. *Jones* v. *Bankers Life Co.*, 131 F.2d 989 (4th Cir. 1942); *Exchange Bank* v. *Monteath*, 26 N.Y. 505 (1863).

** See Exhibits C and I which represent standard CBS network and station contracts. Clause 8(d) of the network television contract states that "Time of payment hereunder is of the essence." Clause 6 of Exhibit I (the Television Stations National Sales Basic Agreement) provides *inter alia* that "Advertisers shall pay CBS, in accordance with such billing, within ten calendar days after receipt thereof."

the original authority of the agent. In such cases the third party cannot recover from the principal. Restatement, Agency Second §112 (see Comment (c) §§165, 166, 171; *Exchange Bank* v. *Monteath, supra; Guardian Foundation* v. *Turner,* 129 P. 2d 592; *Schaffner* v. *New York Trust Co.,* 264 A.D. 724, 34 N.Y.S.2d 537 (1st Dept.), *aff'd* 290 N.Y. 588 (1943). The diversion to its own uses of moneys paid to an agent for a particular purpose is clearly an act prejudicial to the interests of the principal which would render this rule applicable.

The record indicated that CBS was acting in its own interests, and permitted these extensions in order to foster further business in disregard of the interests of Stokely and presumably other advertisers. CBS thereby assumed control over Lennen's collection and application of moneys from its advertisers, including Stokely, and made Lennen its own agent or, in any event, created a "dual" agency. A dual agency exists, of course, where an agent for one party acts for another party whose interests are adverse to those of the principal. 2 N.Y. Jurisprudence §§203, 2[illegible]; *Schaffner* v. *New York Trust Co., supra; Reynolds* v. *Snow,* 10 A.D.2d 101, 197 N.Y.S.2d 590 (1st Dept. 1960). See also 4 ALR 3d 1197.

There must be a limit on what a network can be allowed to assume about the authority of an advertising agency which purports to be acting for a disclosed principal and, more important, ostensibly committing the credit of the principal to "contracts" which are either never signed (network) or which are signed (stations) but not by the principal. CBS maintained a staff of credit men whose

sole responsibility it was to see that CBS got paid for its broadcast time. When delays ensued they made inquiries —but only to the agency, never to the advertiser. The reason was obvious. Both CBS and Lennen knew, although Stokely did not, that Lennen was using payments made by its clients without segregation or reservation of any kind but rather as one large undifferentiated cash flow.

As long as Lennen was making a profit, this approach worked out. However, when the agency got into difficulty, payments fell behind. CBS in the normal course of its credit policies, checked with Lennen and was apprised of the facts at least as early as 1970. Notwithstanding its negative findings, CBS continued to deal exclusively with the agency and extended generous terms of credit to it. Lennen was acting on its own and CBS knew it. Stokely did not need and did not ask for special credit terms. It paid in full when billed. Stokely does not concede that Lennen ever had authority to commit Stokely's credit in its dealings with CBS but assuming *arguendo* it did, from the point (in 1970) where Lennen first fell behind and CBS, without notice to Stokely, chose to extend the credit terms for the bills in issue, CBS lost all right to seek any payment from Stokely as Lennen's principal.

The facts extant here are similar to those encountered in cases where the law of surety is involved. Where a creditor such as CBS extends the time of payment of the principal debtor, Lennen without consent of the "surety" (analogous to the position of Stokely), the surety is discharged and is no longer liable. *National Park Bank of New York* v. *Koehler*, 204 N.Y. 174, 122 N.Y.S. 490 (1912); *Hall and Company, Inc.* v. *Continental Casualty Company,*

34 A.D.2d 1028, 310 N.Y.S.2d 950 (3d Dept. 1970); *British Supreme Cloths Ltd.* v. *Futura Fabrics Corp.*, 34 A.D.2d 642, 310 N.Y.S.2d 47, *aff'd* 28 N.Y.2d 727, 321 N.Y.S.2d 114 (1971).

POINT II

The District Court correctly found that CBS dealt with Lennen as an independent contractor.

As pointed out in *Clarke* v. *Watt*, *ABC* v. *North American Van Lines Inc.*, and in the *U.S. Media* and *Goozh* cases, discussed in Point I, whether or not there is any basis for finding any agency relationship between an advertiser and its advertising agency in a particular case, where the media company deals with the agency alone, extending credit to the agency and relying upon it for payment, it elects to deal with the agency as an independent contractor. It cannot later seek to impose responsibility upon the advertiser as a principal.

In this case it is clear that there was abundant evidence to support the court's conclusion that CBS sold its broadcast time to Lennen as an independent contractor. CBS not only extended credit to Lennen in selling to it initially* and by billing it directly, but also by continuing to defer effecting payment throughout many months, while regularly monitoring the agency's financial situation and its ability to pay. Having thus relied upon its evaluation of the agency's credit to ensure payment, CBS cannot now con-

* CBS conceded that in selling to Lennen it relied at least in part on the agency's credit, and that Lennen was on a list of approved credit risks (134a).

tend that it dealt with Lennen only as agent for Stokely and treated Stokely as being obligated for such payment. Indeed, CBS not only permitted Lennen to defer payment from month to month, without security, throughout 1970 and 1971, but it agreed to enter into arrangements with Lennen predicated upon the agency's payment of its outstanding debt over a 2- to 3-year period, based upon CBS' anticipation of the agency's ability to pay.

Furthermore, each step of the billing and payment procedures between CBS and Lennen demonstrates that the course of dealing was not between CBS and a mere agent of the advertiser, but constituted an arrangement for the mutual benefit of CBS and Lennen. It made no difference to Stokely whether it paid CBS 85% of the gross charges and Lennen 15% or paid CBS 100% and let it pay Lennen its commission—the cost to Stokely would be the same. It was CBS' choice, however, to bill the agency the gross charges. The agency, having been paid in full by its client, would then deduct its commission and pay the network the balance. This system saved bookkeeping for the network and cut down substantially on the number of parties it had to deal with in the event of payment problems. The agency benefited by the cash flow (the extent thereof apparently depended on the generosity of the credit terms extended to it by the network). When this system broke down, only then did CBS seek to rely upon its form "contracts" to attempt to hold the advertiser responsible for paying its charges, despite the fact it had already paid those charges to the advertising agency with CBS' knowledge and approval.

Under circumstances that were remarkably similar to those herein, this Court rejected plaintiff's contention in *Farrell Lines Incorporated* v. *Title Industrial Corporation*, 306 F. Supp. 1348 (S.D.N.Y. 1969), *aff'd* 419 F.2d 835, *cert. denied* 397 U.S. 1042 (1970). The plaintiff carrier there sued the defendant shipper for ocean freight on three shipments of steel from Baltimore to Africa. The cargo had been booked on the plaintiff's vessels by a freight forwarder, Baltimore Dispatch Corporation. The shipper paid the forwarder for the freight but the forwarder failed to pay the carrier and eventually went bankrupt. The bills of lading involved stated that the "shipper and consignee shall be jointly and severally liable to the carrier for payment of all freight." In analyzing the relationship among shipper, freight forwarder and carrier, the Court (MacMahon, D.J.) stated:

> "* * * The carrier argues that this provision obligated the shipper to pay the carrier, regardless of the shipper's payment to the forwarder. The shipper, on the other hand, contends that the forwarder was the carrier's agent for receipt of payment and that payment to the forwarder constituted payment to the carrier. We must, therefore, examine the underlying transactions and determine whether the forwarder was actually the carrier's agent.
>
> "Whenever the shipper had freight to send overseas, it would communicate with the forwarder and advise as to the quantity of cargo to be transported, the number of the box car in which the cargo was located and the cargo's destination.
>
> "The forwarder would, thereafter, make all preparations necessary for the transportation of the cargo, without direction or instruction from the shipper. The forwarder would select the carrier, book passage for

the cargo, arrange for delivery to the carrier's vessels and prepare the bills of lading for the carrier's signature. The forwarder was paid for these services by the carrier, based on a percentage of the freight charges, in addition to a nominal payment by the shipper for clerical services.

"Neither the shipper nor the carrier, however, had any control over the manner in which the forwarder performed these services. Moreover, the forwarder would deal with many other carriers and shippers besides the parties.

"Absent the critical elements of control and exclusivity, we find that the forwarder was neither the carrier's agent for receipt of payment, nor the shipper's agent in transactions with the carrier, but rather an independent contractor." (306 F. Supp. at pp. 1349-50)

After noting that in the transactions between them, credit was extended by the carrier to the freight forwarder and not to the shipper, and that prior to its insolvency the carrier for some four months had attempted to collect from the forwarder, the Court concluded:

"We find, therefore, that the carrier extended credit in the amount of the freight due to, and looked for payment from the forwarder.

"Thus, the determinative question is whether, despite the shipper's payment of the freight charges to the forwarder, the bills of lading require the shipper to pay the freight charges when the carrier unilaterally extended credit for the freight to the forwarder.

"The carrier could have billed the shipper directly. Instead, for its own convenience, it chose to extend credit to the forwarder. The carrier derived many benefits from this arrangement. Since shippers do not have forwarders' expertise in ocean freight, the

carrier, by dealing solely with forwarders, is relieved of many of the burdensome details which unknowing shippers would thrust upon it. The carrier is also relieved from checking the credit ratings of an almost infinite number of shippers and, instead, can rely on the credit of a limited number of forwarders.

"Thus, the carrier accepted the forwarder as the principal and obligor on the freight contract. Allowing the carrier to recast the transaction in a different mold because of the forwarder's insolvency would be most unjust. Were the situation reversed and the shipper insolvent, it would be no defense in an action by the carrier against the forwarder for the forwarder to claim that it was not the obligor, when it is clear that the forwarder handled all aspects of the transaction and the carrier regarded the forwarder as the contracting party.

"We find that the carrier made a full and proper charge for the ocean freight and that it extended credit to, and looked for payment from, the forwarder by stamping the bills of lading 'Freight Prepaid' and accepting in return the forwarder's signature on the due bills. We find that the shipper made full payment to the forwarder prior to the forwarder's insolvency.

"We conclude that the carrier dealt with the forwarder as shipper in fact, and therefore defendant shipper is not responsible for the forwarder's nonpayment." (306 F. Supp. at p. 1351)

See also: *Consolidated Freightways Corp. of Delaware* v. *Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971); *Missouri Pac. R.R. Co.* v. *National Milling Co.*, 276 F. Supp. 367 (D.N.J. 1967), *aff'd* 409 F.2d 882 (1969); *Hellenic Lines Ltd.* v. *Alexander Pach, Inc.*, 20 Misc. 2d 170, 192 N.Y.S.2d 660 (Mun. Ct., City of N.Y. 1959); *Alcoa S.S. Co.* v. *Graver Tank and Mfg. Co.*, 124 N.Y.S.2d 77, 1953 A.M.C. 844 (Civ. Ct. 1953).

Similarly, Judge Wyatt found on the undisputed facts in the instant matter that CBS chose to deal with Lennen on a similar basis:

> "CBS dealt with Lennen as an independent contractor, not as an agent for Stokely. CBS extended credit to Lennen, not to Stokely. This is shown beyond question by the course of dealing. From the time in 1970 when CBS learned of the financial trouble of Lennen and until February 1972, CBS looked solely to Lennen for payment. There was never a suggestion by CBS in this long and critical period that Stokely was liable to CBS. The demand on Stokely came only after CBS realized in February 1972 that Lennen could never pay its debt. Then CBS 'opted to move directly against the advertisers' (Ex. 00)." (81a)

POINT III

The District Court's finding of estoppel on the part of CBS was fully warranted.

The pattern of CBS' conduct herein constituted more than a sufficient basis for the District Court's finding that CBS was estopped from looking to Stokely for collection of the moneys which are the subject of this suit. The facts demonstrated not only knowledge on the part of CBS that Lennen was in financial straits and was acting in a manner inconsistent with and detrimental to the rights of Stokely in failing to remit payments to CBS, but also conduct by CBS which amounted to concealment of these material facts from Stokely by virtue of (a) silence where, if CBS were considered to have a claim against Stokely for Lennen's defalcations, CBS had a duty to inform Stokely of the true state of affairs, (b) acquiescence in the actions of

Lennen which logically and foreseeably could adversely affect Stokely's rights, (c) deferral of Lennen's obligations, including those for Stokely advertising, at the same time it continued to solicit purchases of further broadcast time, including time for Stokely advertising, from the agency, and (d) failure to notify Stokely of its intention to assert a claim against it as advertiser. On the other hand, Stokely had no knowledge as to the true state of Lennen's financial condition or the agency's substantial modification of payment arrangements with CBS, and at all times acted in good faith and in reasonable reliance upon the conduct of CBS and Lennen as CBS continued to sell broadcast time to Lennen and Lennen continued to collect moneys from Stokely for payment of such time, without comment.*

As previously pointed out, CBS can only point to vague references by Lennen personnel that the advertisers knew of Lennen's financial difficulties. Reliance by CBS on such comments, even if they indicated that Stokely was so informed, would be unreasonable and unrealistic. They certainly could not justify further credit extensions by CBS to Lennen at a time when it knew Stokely was continuing to pay its advertising bills to Lennen and Lennen was not remitting such moneys to CBS. It is unreasonable to assume Stokely would continue to utilize Lennen and pay it as it always had done once Stokely became aware of Lennen's difficulties. Stokely's actions

* While CBS asserts that it kept track of the ability of the agencies to pay for broadcast time and that if an agency lost that ability it would not accept further advertising through that agency (CBS brief p. 27, fn.) it did not do so here. It continued to sell broadcast time to Lennen on a current basis after Lennen had demonstrated a complete inability to pay for advertising already obtained from it and other media.

when in fact it was first advised of Lennen's difficulties confirms this. For CBS to assume that Lennen had notified its advertisers of its delinquency in paying accounts and diversion of the moneys received from them expressly for such purpose ignores the realities of the situation.

The reasons for CBS' position were analyzed in the District Court's opinion as follows (76a-77a):

> "The record shows that the position of CBS was determined by the fact that Lennen was one of the largest agencies and over many years had given CBS major business from many clients. CBS wanted to keep the good will of Lennen and to keep Lennen in business. Had the situation been disclosed to the advertisers, such as Stokely, these would likely begin paying their bills directly to the media or leave Lennen. * * *
>
> It is doubtless true that CBS felt that notifying the advertisers would jeopardize Lennen's chance to survive, but this feeling was based on the interests of CBS in the survival of the agency and not on the interests of the advertisers themselves."

The testimony of CBS' network controller Louis Rauchenberger here supports the conclusions of the District Court in the following colloquy (125a):

> "Q. Isn't it correct to say that CBS wanted Lennen & Newell to continue as an agency because of the amount of orders placed with CBS?
>
> A. I don't know that Lennen & Newell preferred us to any other network. I don't know the specific value of the agency. However, we had been dealing with Lennen & Newell over a period of time and I am sure CBS preferred to continue the relationship."

The law has long recognized that when a party in his relationship with another, has a duty and opportunity to speak in order to avoid harm or injury to the other party, but fails to do so, to the ultimate prejudice of that other party, he will be estopped from thereafter relying on that relationship. *French American Banking Corporation* v. *Fireman's Fund Co.*, 43 F.Supp. 494 (S.D.N.Y. 1941); *Menendez* v. *Fabor, Coe and Greeg, Inc.*, 345 F.Supp. 527 (S.D.N.Y. 1972), *mod.* 485 F.2d 1355; *Armour and Co.* v. *Celic*, 294 F.2d 432 (2d Cir. 1961); *Hampton* v. *Paramount Pictures Corp.*, 279 F.2d 100 (9th Cir. 1960). The duty to speak need not necessarily be purely a legal duty, *Simmons* v. *Westwood Apartments Company*, 261 N.Y.S.2d 736, 740 (Sup. Ct. Onondaga Cty. 1965), but may be founded in principles of ethics, good faith and conscience and the like. *Armour and Co.* v. *Celic, supra*, 437. Furthermore, it is immaterial to a claim of estoppel that there was no actual attempt to defraud or mislead. *Rothschild* v. *Title Guarantee and Trust Co.*, 204 N.Y. 458, 462, 97 NE 879, 880 (1912).

If CBS always intended to look to Stokely for payment if Lennen failed, good business judgment dictated and it behooved CBS to give Stokely some notice of Lennen's situation prior to placing and accepting the orders which are the subject of this action. CBS, by regular audit verification methods and procedures, could have notified Stokely of the amount of money due it from Lennen for Stokely advertising and at the same time indicated to Stokely that it was looking to it for payment of such amount. This was not done at any time. Certainly, CBS should have notified Stokely of any delinquency in the

agency's payments for Stokely advertising when Lennen's delinquency became as serious as it did in 1970 and again in the summer of 1971.* Furthermore, in the circumstances of this case, CBS had no right to agree to altering the terms of payments in its "contracts" with Lennen or to defer payments to foster its own and Lennen's ends, unless it never intended to seek payment from Stokely.

Stokely had no reason to question Lennen's financial condition since CBS was continuing to run its advertising, and was continuing to deal with Lennen and Stokely had no reason to believe that its payments to Lennen were not being applied to payment for its advertising. Had Stokely known that Lennen was falling behind in its payments to CBS, and that CBS might look to it for payment, Stokely would have taken steps to acquire a new agency or protect itself against any claim that might be made against it much earlier than it did.

It is also a well settled principle of law that one who fails to protest when he has a duty and opportunity to speak is deemed to have acquiesced in a course of conduct and will be estopped from complaining later. 21 N.Y. Jurisprudence §35. By agreeing to various new payment arrangements, arrangements which were obviously detrimental to Stokely's interests, CBS adopted a plan whereby it looked to Lennen for payment rather than Stokely. Having acquiesced to this arrangement, CBS is now estopped from impeaching it.

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* CBS' contention that the amount of Lennen's total receivables over 90 days overdue prior to November 30 were not of a sufficient magnitude to give it cause for concern (CBS brief p. 36) ignores the fact that CBS was indeed sufficiently concerned during 1970 and 1971 about Lennen's payments to insist upon being kept apprised of every aspect of the agency's operations.

Closely related to estoppel by silence and acquiescence is estoppel by delay. There is no necessary estoppel arising from the mere passage of time, but when a party such as CBS, claiming rights, takes no steps to enforce them until the position of the other party (Stokely) becomes so changed that it cannot be restored to its former state that delay operates as an estoppel against the assertion of the right. *Pam-to-pee* v. *United States,* 187 U.S. 371, 23 S. Ct. 142 (1902); *O'Brien* v. *Wheelock,* 184 U.S. 450, 22 S. Ct. 354 (1902). Assuming that CBS had any rights whatsoever against Stokely for payment of moneys expended for advertising, by looking to and dealing with Lennen concerning the payment of overdue bills, CBS indicated not only an intention to rely on Lennen's credit, but an intention to abandon any right it might have previously had against Stokely. Even if CBS intended all along to look to Stokely for payment it should be estopped from doing so now by virtue of its negligent failure to assert all of its claims or otherwise advise Stokely of salient and damaging facts before events progressed to a point where Stokely had made substantial payments to Lennen for advertising far in excess of the sums claimed by CBS.

In *The Hearst Corporation* v. *Mautz Paint & Varnish Company,* Circuit Court, Milwaukee County, Civil Div. Case No. 342-462, July 17, 1969, the court held a media creditor estopped from recovering moneys from an advertiser in analogous circumstances. There the media creditor had known but failed to reveal that the advertising agency, with whom it dealt as defendant's advertising agency, was in financial straits and had accumulated a growing debt on its account with the media creditor.

Rather, the plaintiff went forward, contracting with the agency for the broadcast time it requested. Thereafter, plaintiff was unable to collect the bill for this time from the agency, which became insolvent. The court held that because of the plaintiff's failure to notify the advertiser as to the perilous financial condition of the agency, it was estopped from collecting on the contract from the advertiser itself, stating:

> "Before entering into the contract with Seitz [the advertising agency] on March 3, 1964, Hearst [the media] had the duty and obligation to inform Mautz [the advertiser] of the true state of the financial affairs then existing between Hearst and Seitz. At the time Hearst knew of the high arrearage of Seitz. Mautz did not, nor did Hearst have reason to believe that Mautz had actual knowledge of the delinquency.
>
> "Mautz was entitled to have Hearst exercise ordinary business practice and prudence, usually exercised by a person of ordinary intelligence and prudence under the same or similar circumstances.
>
> "At this stage of the relationship between Seitz and Hearst, it can hardly be said that the ethics of the advertising industry could stand in the way of a creditor informing a debtor *not a signatory to a contract but sought to be held as principal debtor* that its agent had not been forwarding the amounts due on the account, and that the account was hopelessly in default. It would have been no breach of faith on the part of Hearst to have taken the moment required and inform Mautz that the Seitz account is long overdue, and before entering into any further contracts obligating Mautz, to alert Mautz of the true financial standing of the account." Decision, J. Raskin, pp. 7-8. (Emphasis supplied.) (This decision is not officially reported; a copy is included in the Appendix to the brief.)

In the instant case, the conduct of the purported creditor was even more reckless with regard to the advertiser's rights. CBS knew not only that Lennen was financially distressed but also that the agency had used moneys paid to it by Stokely expressly for the CBS bills, for other purposes. CBS knew that was the fact in 1970 and that the situation had only worsened during 1971; Lennen was using moneys paid to it by Stokely for the same television commercials which are the subject of this suit for other uses. Nevertheless, despite this knowledge, and without any basis for believing that Stokely knew or approved, CBS extended the time of payment by Lennen far beyond any reasonable period, in direct violation of the "contracts" upon which it relies and contrary to its standard practice, and even agreed to defer payment for several years so as to enable it and Lennen to continue to do business with each other. During all this time, CBS failed to take the moment required to inform Stokely of these dealings. The District Court concluded that by having conducted itself in the manner in which it did, to Stokely's injury, CBS was estopped from recovery against Stokely now. The court's reasoning was summed up as follows (82a):

> "CBS acted reasonably in its own interest. It tried to keep Lennen alive by all reasonable means, this because it believed that CBS (and all others concerned) would benefit thereby. CBS took the risk alone; it did not share its knowledge of the risk with Stokely, which might have declined to take the risk and have protected itself from loss. Of the two innocent parties, the loss should fall on the party which knowingly took the risk of loss."

In the tight, close knit community of advertising agencies and television networks, a sponsor has but one

limited responsibility—to pay for its advertising. Stokely paid. It paid the full amount due. It paid promptly and through the route most convenient and profitable for the agency and the network. It should not be required to pay twice.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

January 22, 1975

Respectfully submitted,

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Service of 2 copies of the
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Jan. 1975
Signed

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